IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35393

IDAHO STATE SPEECH AND HEARING SERVICES LICENSURE BOARD,	**2009 Unpublished Opinion No. 642**
Plaintiff-Respondent,	**Filed: October 16, 2009**
v.	**Stephen W. Kenyon, Clerk**
RANDELL E. BROWN,	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
Defendant-Appellant.	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Gregory S. Anderson, District Judge.

Order granting summary judgment, affirmed.

Randell E. Brown, Idaho Falls, *pro se* appellant.

Naylor & Hales, P.C., Boise, for respondent. Bruce J. Castleton argued.

GUTIERREZ, Judge

Randell E. Brown appeals *pro se* from the district court's grant of summary judgment against him upon reconsideration. We affirm.

I.
FACTS AND PROCEDURE

In 2000, the Idaho Bureau of Occupational Licenses (IBOL)[1] filed an administrative complaint before the former Idaho State Hearing Aid Dealers and Fitters Board of Examiners (HADFB), the predecessor of the Idaho State Speech and Hearing Services Licensure Board (the Board), against Brown, a licensed hearing aid dealer and fitter. The complaint alleged that Brown had violated certain Idaho statutes, regulations, and/or rules relating to the conduct of licensed hearing aid dealers and fitters. After an investigation was conducted and a hearing was

[1] Idaho Bureau of Occupational Licenses is an agency of the State of Idaho, organized and existing pursuant to I.C. § 67-2601, *et seq*. and acts as an agent of other state agencies.

held on the allegations, HADFB entered a final order on September 24, 2002, finding that Brown acted in violation of Idaho rules and statutes governing his professional conduct and imposing attorney fees and costs.

After acknowledging his receipt of the final order on September 26, 2002, Brown filed a motion for reconsideration on October 15, 2002. On November 14, 2002, HADFB denied the motion and mailed the order to Brown at his last known address. Brown claims that he did not receive the notice of the denial of his motion to reconsider until May 23, 2003, when he was given a copy of the order by the Attorney General's office.

On June 10, 2003, Brown filed a petition for judicial review of HADFB's 2002 final order. The district court dismissed the petition as untimely. Brown subsequently failed to pay the costs imposed against him in the 2002 final order. On April 28, 2005, HADFB and IBOL filed a complaint against Brown in magistrate court in an effort to recover the costs. Brown answered the complaint and filed a counterclaim against the agencies, arguing, among other things, that the 2002 final order was invalid. Brown also filed a second petition for judicial review, again challenging the validity of the 2002 final order. The district court denied the petition on the same grounds that it had denied his first petition.

HADFB and IBOL's case seeking to recover costs against Brown was eventually transferred to the district court. The agencies filed a motion for summary judgment in January 2007, arguing, among other things, that Brown's counterclaim was effectively a request for judicial review of the 2002 final order and was therefore time-barred by the fact that he did not timely file for judicial review of HADFB's order. Brown responded with his own motion for summary judgment, arguing, among other things, that the HADFB (and IBOL as its agent) lacked standing to enforce the 2002 order because on July 1, 2005, the Board replaced HADFB by operation of statute. *See* I.C. § 54-2901 *et seq*.

The district court denied HADFB and IBOL's motion for summary judgment due to lack of standing and also denied Brown's motion for summary judgment. The agencies subsequently moved to substitute the Board as the real party in interest, which the court granted over Brown's objection. The Board filed a motion for summary judgment, reasserting the grounds set forth in the agencies' January 2007 motion. The court again denied the motion, concluding that there was a genuine issue of material fact as to whether the composition of the HADFB was legal when it rendered its 2002 final order.

The Board filed a motion to reconsider the denial of its motion for summary judgment, which the district court granted, entering summary judgment against Brown on all of the Board's claims and Brown's counterclaims. Brown then filed a memorandum on issues not adjudicated, wherein he requested that the district court act on a criminal complaint Brown had previously filed in the case against certain individuals affiliated with HADFB, IBOL and the Board. Brown also filed a notice of appeal regarding the district court's grant of the Board's motion for summary judgment. The district court subsequently ruled that Brown's filing of a notice of appeal divested the court of jurisdiction to address his criminal complaint until the appeal was resolved.

II.
ANALYSIS

On appeal, Brown makes various arguments which we interpret to be a challenge to the district court's grant of the Board's motion to reconsider. He also references his dissatisfaction with the fact that the Attorney General is not representing the Board in this matter and requests that this Court address a criminal complaint he previously filed against certain individuals associated with HADFB, IBOL and the Board.

A. Motion to Reconsider

Brown argues that the district court erred by granting the Board's motion to reconsider its denial of the Board's motion for summary judgment on the issue of the costs due the Board from the administrative action and on the issue of Brown's counterclaims--and accordingly denying Brown's motion for summary judgment.

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Campbell v. Reagan,* 144 Idaho 254, 258, 159 P.3d 891, 895 (2007); *Carnell v. Barker Mgmt. Inc.,* 137 Idaho 322, 329, 48 P.3d 651, 658 (2002). When reviewing a motion for summary judgment, this Court uses the same standard employed by the trial court when deciding such a motion. *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust,* 145 Idaho 208, 212, 177 P.3d 955, 959 (2008); *Kolln v. St. Luke's Regl. Med. Ctr.,* 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997). "[I]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" summary judgment is proper. I.R.C.P. 56(c). The burden is on the moving party to prove an absence of genuine issues of

material fact. *Evans v. Griswold,* 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). When reviewing a district court's ruling on a motion for summary judgment, this Court liberally construes the record in favor of the party opposing the motion, resolving all inferences that reasonably can be drawn from the record in that party's favor. *V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, 128 Idaho 890, 892, 920 P.2d 909, 911 (1996). This standard is not lessened where both parties have moved for summary judgment. *Id*.; *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); *Kromrei v. AID Ins. Co.,* 110 Idaho 549, 551, 716 P.2d 1321, 1323 (1986). When reviewing a district court's ruling on such motions, this Court must examine each motion separately, alternatively resolving the reasonable inferences presented by the record in opposition to each party's motion. *V-1 Oil Co.*, 128 Idaho at 892, 920 P.2d at 911; *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995).

We first examine the district court's grant of the Board's motion for summary judgment on the issue of costs awarded in the administrative action. In arguing against the grant of summary judgment on this issue below, Brown claimed that the Board lacked standing to prosecute the action against him--a claim which he now advances on appeal. Specifically, Brown argues that the Board is not the legal successor in interest of HADFB and therefore cannot collect on Brown's financial obligation to HADFB.

In 2005, the Idaho Legislature enacted H.B. 247, which repealed the Hearing Aid Dealers and Fitters Act and replaced it with the Speech and Hearing Services Practices Act, I.C. § 54-2001 *et. seq*. *See* 2005 S.L. Ch. 277, Addendum 3. The stated purpose of the legislation was to extend the licensing requirements applicable to hearing aid dealers and fitters to audiologists and speech language pathologists as well, occupations which, aside from audiologists who fit and dispensed hearing aids, had previously not been required to be licensed in Idaho. Statement of Purpose for H.B. 247, 2005. Among other things, the new act directed that a newly created Speech and Hearing Services Licensure Board replace the HADFB and that the new Board was entitled to the same right to enter into an enforcement agreement with IBOL that HADFB had enjoyed. *See* 2005 S.L. Ch. 277.

Brown contends that the Board is not the legal successor in interest of HADFB because the relevant sections of the statute which abolished the HADFB and created the Board "contained no mention of amendment, assumption, continuation or succession" and that because

the enacting legislation creating the Board did not specifically provide that the Board could assume the assets and liabilities of HADFB, the Board is prohibited from doing so. In rejecting this argument, the district court relied on *Canyon Highway District No. 4 v. Canyon County*, 107 Idaho 995, 695 P.2d 380 (1985). In that case, after Canyon County voters approved the revision of the county's secondary road system, the Canyon County commissioners voted in December 1980 to abolish the Canyon County Road and Bridge Department (Department) and to create the Canyon Highway District No. 4 (District) to replace it. Upon this enactment, the governor appointed commissioners for the newly created district, whereas the Department had been administered by the county commissioners. In January 1981, the county commissioners turned over the Department's vehicles, equipment, and budget to the District.

The Department had been entitled to a portion of the sales tax revenues based on the taxing district status of Canyon County. However, in 1981 the county determined that because the District was not in existence as a taxing district in the fourth quarter of 1979, it would not receive the Department's apportionment of county funds for that quarter. The District filed a complaint, and the district court found that because the District had "essentially replaced" the Department, consisted of the "same people" serving the "same government function" and was merely an administrative change, it was therefore, entitled to the apportionment of county funds that had previously been collected and apportioned to the Department. The district court observed that:

> Although the wording of [the statute indicating how sales tax proceeds returned to the counties should be distributed], as amended, appears unambiguous on its face, the court concludes that there is a latent ambiguity when that section is applied to the facts of this case. Canyon Highway District No. 4 took charge of the same equipment, employees and budget that had been used by Canyon County in the operation of the Road and Bridge Department. The same people and the same government function are served by Canyon County.

The court further ruled:

> It is clear from a reading of the question voted upon by the electorate, and from a reading of the "Commissioners' Statement of Purpose," that the only change which would occur if the people elected to reorganize would be a change of administration; the principal [sic] purpose of the election was to remove the county commissioners from road administration and vest that power and authority in a board of independent highway district commissioners. There was no dissolution of anything, nor creation of anything, by the electorate's decision to reorganize; it merely resulting in a change of administration of an ongoing governmental function.

Canyon Highway, 107 Idaho at 997, 695 P.2d at 382. The Idaho Supreme Court affirmed, stating that "[i]t would not be reasonable to assume that the legislature intended to allow the county commissioners to turn the responsibility for road maintenance over to the highway district while retaining the sales tax moneys which were used by the county commissioners when they were discharging that responsibility." The Court concluded that "[t]he more reasonable interpretation is that the sales tax money should follow the responsibility." *Id.*

In this case, the district court concluded that as in *Canyon Highway*, the legislature had granted the newly formed Board duties and powers similar to those held by HADFB and therefore, it would not be reasonable to assume that the legislature intended to turn HADFB's responsibilities over to the Board without also turning over HADFB's assets--which included Brown's obligation for attorney fees and costs. We agree with the district court in this respect. That the enacting legislation did not explicitly authorize the Board to assume HADFB's assets is not controlling. In substance, the difference between the Board and HADFB was a change in administrative organization, with the new Board assuming jurisdiction over those licensed under HADFB and the Board surviving as *the* regulator of hearing aid dealers and fitters licensing as HADFB had been and assuming similar powers and duties that had been granted HADFB. *Compare* I.C. § 54-2914 (2004) *with* I.C. §§ 54-2910, 2925 (2008). As the district court pointed out, the Board assumed HADFB's budget, collected its operating fees from hearing aid dealers and fitters in the same manner as did HADFB, and the change resulted in only a partial change in administration with the chairperson of HADFB becoming the chairperson of the Board and two members of HADFB becoming members of the Board. In addition, the provision contained in the old statute that "[a]ll money received pursuant to the provisions of this act shall be deposited to the occupational license fund" and that "[a]ll expenses incurred pursuant to the provisions of this act shall be paid from the occupational fund" survived in the new statute. *Compare* I.C. § 54-2918 (2004) *with* I.C. § 54-2911. As in *Canyon Highway*, it would be unreasonable to assume that even though the Board was created to perform the same responsibilities regarding the licensure of hearing aid dealers and fitters as had been assigned to HADFB, it was not to retain HADFB's assets as well.[2] Thus, we conclude that the district court was correct in

[2] Brown argues that *Canyon Highway* is not applicable to his case because that case involved a constitutionally mandated government entity (Canyon County) whereas the present case involves a legislatively created entity (IBOL). However, the result in *Canyon Highway* was

determining that the Board had standing to pursue this claim and given that there existed no other genuine issues of material fact and that the Board was entitled to judgment as a matter of law, the court did not err in granting the Board's motion for reconsideration in this regard.

In addition to contesting the Board's motion for summary judgment, Brown also asserted various counterclaims and requested summary judgment on these claims. As discussed above, the district court eventually granted the Board's motion for summary judgment on Brown's counterclaims and denied Brown's motion for summary judgment. Brown raises only one of his counterclaims on appeal--that the 2002 final order is invalid, and thus cannot be enforced, because HADFB was illegally constituted at the time it issued the order.

The district court ultimately denied Brown's motion for summary judgment on this issue, concluding that based on the plain language of the relevant statute, HADFB was legally constituted in September 2002. We need not reach the merits of Brown's argument, however, because we conclude that the issue was not properly before the district court.

Brown's contention regarding the makeup of HADFB at the time it issued the 2002 final order is an attack on the validity of the 2002 final order itself. Such a challenge can only be made through judicial review. Judicial review is defined by our Rules of Civil Procedure as "the district court's review pursuant to statute of actions of agencies . . . ." I.C.R.P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. I.R.C.P. 84(a)(1); *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d 732, 735 (2006); *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003). Thus, a party's failure to physically file a petition for judicial review with the district court within the time limits prescribed by statute and the Rules of Civil Procedure is jurisdictional, and absent compliance with a statue's filing requirements, a court has no jurisdiction to review a board of commissioner's final determination. *In Re Quesnell Dairy*, 143 Idaho 691, 693, 152 P.3d 562, 564 (2007); *Floyd v. Board of Comm'rs of Bonneville Cty*, 137 Idaho 718, 723, 52 P.3d 863, 868 (2002). As a result, failure to file a timely petition for judicial review results in dismissal of the appeal. I.R.C.P. 84(n).

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not predicated on the county being a constitutionally-created entity and Brown fails to cite any authority indicating that the distinction he points out mandates a different outcome in this case.

The Idaho Administrative Procedure Act, which applied to HADFB and now to the Board, provides in part that "[a] petition for judicial review of a final order . . . must be filed within twenty-eight (28) days of the issuance of the final order . . . or if reconsideration is sought, within twenty-eight (28) days after the decision thereon." I.C. § 67-5273(2). Thus, the statutory framework provides for judicial review of HADFB's decisions and since generally there is no right of review absent a statutory grant, the separate character of this form of proceeding demonstrates legislative intent that these proceedings are the exclusive means by which a HADFB decision can be challenged. *Cobbley*, 143 Idaho at 133, 139 P.3d at 735. As our Supreme Court has noted, "[i]t therefore goes almost without saying that if the exclusive and otherwise unavailable method is set forth in the provided-for judicial review procedures, one cannot challenge in a separate civil suit the act of a board where the board has acted on matters within its jurisdiction." *Id*. at 134, 139 P.3d at 736.

Here, there is no dispute that Brown did not file a petition for judicial review within twenty-eight days of November 14, 2002, the date on which the district court denied his motion to reconsider. However, Brown claims that he did not receive notice of the order denying his motion for reconsideration until May 2003. Even if true, this assertion would not render Brown's petition timely. Where a petition for reconsideration has been filed, an agency's final order becomes effective when either (1) the petition for reconsideration is disposed of or (2) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one days. I.C. § 67-5246(4). Accordingly, even if Brown did not receive notice of the court's denial of his petition, by operation of law his petition would be deemed denied twenty-one days after he filed it, which in this case was November 5, 2002.[3] Thus, at most, he had until twenty-eight days later (December 3, 2002), to file a petition for judicial review. That he did not do so until June 10, 2003, rendered his petition untimely and deprived the court of jurisdiction to review HADFB's final determination.[4]

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[3] HADFB issued a written order denying Brown's motion for reconsideration on November 14, 2002.

[4] In its memorandum decision and order granting HADFB's motion to dismiss Brown's petition for judicial review of HADFB's final order, the district court also noted that Brown had received actual notice of the statutory time limits applicable to petitions for judicial review of

As a result, the issues regarding the validity of the 2002 final order that Brown raises on appeal--including, for example, his contention that the instigating complaint was invalid because it was not signed--are barred by *res judicata*. *Res judicata* bars the relitigation of the same issues or claims between the same parties to an earlier action. *Waller v. State, Dept. of Health and Welfare*, 146 Idaho 234, 238, 192 P.3d 1058, 1062 (2008). The general rule is that once a judgment is entered, it is *res judicata* with respect to all issues which were *or could have been* litigated. *Id*. Thus, where the district court entered a judgment on the validity of the 2002 final order and Brown could have raised claims regarding the legitimacy of the 2002 final order beforehand, such claims cannot now be raised on this appeal. Accordingly, the district court did not err in granting the Board's request for summary judgment on Brown's counterclaim concerning the validity of the 2002 order--and in so doing, denying his motion for summary judgment regarding the same.

In sum, construing all reasonable inferences in favor of Brown, there remained no genuine issue of material fact and the Board was entitled to judgment as a matter of law in regard to collection of costs and fees assessed against Brown in the administrative action. Likewise, there was no genuine issue of material fact in regard to Brown's claim that HADFB had been illegally constituted, and because such a claim amounted to an attack on the validity of the 2002 order which could only be pursued through the process of judicial review, which Brown did not succeed in instigating in a timely manner, the Board was entitled to judgment as a matter of law. Therefore, the district court did not err in granting the Board's motion to reconsider.

B. Representation of Plaintiffs

For the first time on appeal, Brown questions why the Attorney General's office is not handling this action to collect costs and fees on behalf of the Board. Brown concedes that he did not raise this issue before the district court. As it is well accepted that generally, issues not

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administrative decisions as HADFB's 2002 final order (which Brown acknowledged receiving) contained the following notification:

> c. An appeal must be taken within twenty-eight (28) days: (1) of the service date of this Final Order; (ii) of any order denying petition for reconsideration; or (iii) of the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. (*See*, Idaho Code § 67-5273) [sic].

argued before the trial court will not be considered when raised for the first time on appeal, *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), we decline to address the merits of this contention.

C. Criminal Complaint

Brown requests that this Court address the criminal complaint that he filed against certain individuals associated with HADFB, IBOL, and the Board which the district court declined to address after he filed his notice of appeal. We reject his request for two reasons. First, we note that a civil proceeding is not the appropriate context in which to file a criminal complaint. Also, pursuant to I.R.C.P. 15(a), under these circumstances a party may amend a pleading only by leave of court or by written consent of the adverse party--neither of which the record shows occurred here.

D. Attorney Fees on Appeal

The Board requests that we award it attorney fees and costs on appeal pursuant to I.C. §§ 12-120(1), 12-117. Idaho Code § 12-120(1) provides that:

> Except as provided in subsections (3) and (4) of this section, in any action where the amount pleaded is twenty-five thousand dollars ($25,000) or less, there shall be taxed and allowed to the prevailing party, as costs of the action, a reasonable amount to be fixed by the court as attorney's fees. For the plaintiff to be awarded attorney's fees, for the prosecution of the action, written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before the commencement of the action; provided, that no attorney's fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount of at least ninety-five percent (95%) of the amount awarded to the plaintiff.

Our Supreme Court has held that the language of section 12-120(1) is mandatory as to the prevailing party on appeal. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 287-88, 900 P.2d 191, 195-96 (1995). Thus, where the record shows that HADFB made a demand upon Brown for the amount owed plus interest ($6,511.30) by letter on March 21, 2005 and did not file the complaint in this case until April 27, 2005, the plaintiffs complied with the requirements of I.C. § 12-120(1) and are entitled to attorney fees on appeal.[5]

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[5] Since we have awarded the Board attorney fees on an alternate basis, we need not address the Board's claim that it is entitled to attorney fees under I.C. § 12-117.

Pursuant to Idaho Appellate Rule 40(a), "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." Accordingly, we award costs to the Board on appeal as well.

III.

CONCLUSION

The district court did not err in granting summary judgment in favor of the Board and against Brown upon reconsideration. Additionally, the representation of the Board by private counsel is not properly before this Court on appeal, and we decline to address Brown's criminal complaint. Finally, given the mandatory language of I.C. § 12-120(1), we award costs and attorney fees on appeal to the Board. The district court's grant of summary judgment against Brown is affirmed.

Chief Judge LANSING and Judge Pro Tem PERRY **CONCUR**.